

**UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Roanoke Division**

IN RE:

SCOTT W. NEWBURY,

Case No. 7-01-02678-7

Debtor

**GEORGE I. VOGEL, II, Trustee
in Bankruptcy,**

Plaintiff

v.

**Adversary Proceeding
No. 7-03-00063**

SCOTT W. NEWBURY,

Defendant

DECISION AND ORDER

At Roanoke in said District this ____ day of May, 2004:

The matter before the court is a complaint for turnover of property filed by George I. Vogel, II, Trustee (herein the Trustee). The debtor, Scott W. Newbury, (herein the Debtor) and Len Trovero Construction Company (herein Trovero) were named as defendants. Both filed responsive pleadings and Trovero moved to pay into court the sum of \$34,980.99 representing funds held by it and owed to the Debtor as a result of a workmen's compensation award to the Debtor in Illinois. By agreement of the parties and

order of this court, Trovero paid over to the Trustee the sum of money it was required to remit and was dismissed as a party defendant to the proceeding. Discovery was concluded and a trial date was set for Roanoke, Virginia. In addition, the Debtor, by counsel, filed a motion to amend his schedules and statement of affairs to list the workmen's compensation award as an asset of his estate and to claim it as exempt. The Trustee opposed the motion to amend and objected to any claim of exemption which the Debtor might assert if the amendment to the schedules was allowed. The court took the motion to amend schedules and claimed exemption and the objections thereto under advisement and consolidated consideration of those matters with the adversary proceeding for turnover of property filed by the Trustee. Ultimately, trial was set for December 9, 2003, in Roanoke, Virginia. On that day, evidence was taken from the witness stand, stipulations of facts were submitted by the parties and documentary evidence was admitted. During the course of the trial, the court had an opportunity to observe the testimony of the witnesses and at the conclusion of the evidence heard the parties in oral argument and received written memorandums of authority from the parties.

The court considered all of the evidence submitted, together with the stipulations of fact, and the arguments of counsel, both oral and written. For the reasons stated in this decision and order, the court finds that the property in question, \$34,980.99, constitutes property of the Debtor's estate and that it should be administered by the Trustee for the benefit of creditors. Accordingly, an order will be entered that the Trustee

administer the sum of \$34,980.99 as an asset of the Debtor's estate.

Facts:

Based upon the stipulation of facts filed by the parties and the evidence taken, there is no factual dispute on the following:

1. On June 9, 2000, the Illinois Industrial Commission ordered that Trovero pay to the Debtor the sum of \$34,980.99 for "necessary first aid medical, surgical and hospital services."

2. The Debtor filed a Chapter 7 petition in the United States Bankruptcy Court for the Western District of Virginia on June 14, 2001, together with schedules and statement of affairs.

3. The Debtor's section 341 meeting was held on July 7, 2001, the Trustee reported a no asset case, the estate was closed and the Debtor received a discharge on September 18, 2001.

4. The Debtor did not list the \$34,980.99 award in his original schedules.

5. Subsequent to June 9, 2000, the decision of the Illinois Industrial Commission was appealed by Trovero, was affirmed at all appellate levels, and on April 4, 2003, Trovero was directed by the Circuit Court of Illinois for LaSalle County to remit to the Debtor the sum of \$34,980.99, as a result of litigation for payment initiated by the Debtor in the Circuit Court of Illinois for LaSalle County subsequent to his discharge.

6. At all times relevant to these proceedings the Debtor was aware that he had been awarded recovery from the Illinois Industrial Commission on June 9, 2000, and

was pursuing collection of same both prepetition and post-petition.

7. The Debtor listed the medical providers who were to be paid the award for necessary first aid, medical, surgical and hospital services on his Chapter 7 schedules and those debts were discharged.

8. The Trustee first discovered the existence of the fund when he was contacted by counsel for Trovero on or about July 11, 2002, concerning disbursement of the fund.

9. The disclosure by counsel for Trovero resulted in the Trustee moving to reopen the bankruptcy estate and administer the case as an asset case.

Issue:

Whether the Debtor is entitled to amend Schedules B and C after reopening of the case to list the award as an asset of the estate and to claim it as exempt.

The Debtor argues that Federal of Bankruptcy Procedure 1009(a) permits amendment of his schedules as a matter of course at any time before the case is closed.¹ Since the Debtor's case was closed on September 18, 2001, any reliance by the Debtor on the language in Bankruptcy Rule 1009(a) giving him the right as a matter of course to amend any time before the case is closed is misplaced. However, Rule 1009(a) also

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Bankruptcy Rule 1009(a) General Right to Amend. A voluntary petition, list, schedule, or statement may be amended by the debtor as a matter of course at any time before the case is closed. The debtor shall give notice of the amendment to the trustee and to any entity affected thereby. On motion of a party in interest, after notice and a hearing, the court may order any voluntary petition, list, schedule, or statement to be amended and the clerk shall give notice of the amendment to entities designated by the court.

provides “on motion of a party in interest, after notice and a hearing, the court may order any voluntary petition, list, schedule, or statement to be amended and the clerk shall give notice of the amendment to entities designated by the court.” As stated above, the Debtor filed a motion to enlarge time to file amended Schedules B and C. The Trustee objected and takes the position that the Debtor must justify amendment under Federal Rule of Bankruptcy Procedure 9006(b)(1)(2). The rule covers enlargement “on motion made after the expiration of the specified period. . .” and permits the court to grant the motion for enlargement “where the failure to act was the result of excusable neglect.” Thus, the Debtor must show excusable neglect in order to obtain an enlargement of time to amend his schedules after the closing of the case. It is in this context that the most serious factual dispute must be resolved. The Debtor takes the position that he disclosed to his bankruptcy counsel the existence of his claim for the award and was advised that he would not have to list that claim for award because so much time had passed since he made the claim. Debtor’s testimony of disclosure of the claim award in Illinois is supported by his wife’s testimony that she heard the discussion with Debtor’s counsel. Debtor’s attorney testified that Debtor did not mention the award claim and that it was his custom and practice to schedule such a claim if disclosed. Debtor’s counsel acknowledged receiving a letter, shown as Exhibit F, from Debtor’s Illinois counsel inquiring as to treatment of the claim in bankruptcy. On balance, the court believes that Debtor’s counsel had sufficient information from the Debtor about the existence of the award, or claim for award, and that the omission in the initial schedules and statement of affairs filed by the Debtor was due

either to an oversight by counsel for the Debtor or his opinion that the claim did not constitute property of the estate. Thus, the court finds the necessary excusable neglect to grant the Debtor's motion to enlarge time to permit amendment to Schedules B and C to list the asset and to assert a claimed exemption.

Issue:

Whether the Debtor entitled to claim the award exempt.

28 U.S.C. § 1408 establishes venue in cases under Title 11:

Except as provided in section 1410 of this Title, a case under Title 11 may be commenced in the District Court for the District –

(1) in which the domicile, residence, principal place of business in the United States, or principal assets in the United States, of the person or entity that is the subject of such case have been located for the 180 days immediately preceding such commencement, or for a longer portion of such 180 day period than the domicile, or principal place of business, in the United States, or principal assets in the United States, of such person were located in any other District.

In filing his petition in the Western District of Virginia, the Debtor was representing domicile, or residence in Virginia. Accordingly, any claim of exemption which he might make must arise under Virginia law.² Since the Debtor failed to file his homestead deed claiming an exemption in at least a portion of the award in conformity with Title 34 of the Virginia Code, Title 34 is not available to him at this time to claim an

² The Debtor's argument that the award is Illinois property and, therefore, covered by Illinois exemption statutes is without merit.

exemption.³ Further, as pointed out by the Trustee, there is no other statute in the Virginia Code or decided state case law which gives the Debtor an exemption of the award for “necessary first aid medical, surgical and hospital services.”

Conclusion:

With a finding of excusable neglect, the Debtor is entitled to amend his Schedules B and C to list the award as an asset of his estate and to claim an exemption. However, the Trustee’s objection to the claimed exemption is well taken as there is no statutory or other legal basis for claim of the exemption under Virginia law. Since Virginia law controls the claim of exemption, it is

ORDERED:

That the Debtor’s claim of exemption of the award in the amount of \$34,980.99 from the Illinois Industrial Commission be, and it hereby is **DENIED**, and the Trustee shall proceed to administer that sum as an asset of the Debtor’s estate according to the Bankruptcy Code. Since the funds are in the possession of the Trustee, turnover is accomplished and the Trustee can proceed to administration and conclusion of the reopened case.

Copies of this order are directed to be mailed to Jeffrey A. Fleishhauer, Esquire, P. O. Box 75, Roanoke, Virginia, ,24002, counsel for the Debtor; and to George I. Vogel, II, Esquire, P. O. Box 18188, Roanoke, Virginia, 24014, Trustee.

³ To claim an exemption in bankruptcy, a householder who (I) files a voluntary petition in bankruptcy or (ii) against whom an involuntary petition in bankruptcy is filed shall set such real or personal property apart on or before the fifth day after the date initially set for the meeting held pursuant to 11 U.S.C. § 341, but not thereafter.

Ross W. Krumm
U. S. Bankruptcy Judge